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JUL 28 2011

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
(FRESNO DIVISION)

In Re:)	Case No. 08-13589-B-7
)	
Shawn Deitz,)	Adv. No. 08-01217-B
)	
Debtor.)	TRIAL DATE:
)	APRIL 4, 5, & 11 2011
<u>Wayne and Patricia Ford,</u>)	
)	DEPT.: "F", CT. RM. 13
Plaintiff,)	JUDGE: RICHARD T. FORD
vs.)	
)	
Shawn Deitz,)	
)	
Defendant.)	
)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

1. Shawn Deitz, the Debtor and Defendant in the above-captioned case ("Defendant"), filed a Voluntary Petition for relief under Chapter 7 of the United States Bankruptcy Code on June 20, 2008.

2. The last day to file a complaint objecting to dischargeability of debts under 11 U.S.C. §§523(a)(2), (4) and (6) was September 22, 2008. This Adversary Proceeding was filed September 19, 2008.

1 3. Plaintiffs, Wayne and Patricia Ford ("Plaintiffs"),
2 timely filed a complaint to determine dischargeability of debt
3 on September 19, 2008. Plaintiffs' Adversary Complaint alleges
4 causes of action under 11 U.S.C. §§523(a)(2)(A), (a)(4), and
5 (a)(6)¹.

6 4. Trial occurred on April 4, 5 and 11, 2011 before
7 the undersigned. Thomas H. Armstrong, Esq. represented
8 Plaintiffs. Defendant appeared in pro se. Prior to trial, the
9 undersigned advised the parties that he is not related to or
10 otherwise have any known connection to either Plaintiff despite
11 having the same last name "Ford."

12 5. The Court has considered significant documentary
13 evidence, testimony of five (5) witnesses including each of the
14 parties, assessed each witnesses' credibility, considered the
15 argument set forth in the Plaintiffs' Trial Brief, Defendant's
16 initial representations immediately prior to trial that he never
17 intended to defraud or willfully injure Plaintiffs, and the
18 proposed Findings of Fact and Conclusions of Law submitted by
19 each party.

20 6. After trial, and considering the above, the Court
21 makes the following Findings of Fact and Conclusions of Law
22 pursuant to Federal Rules of Civil Procedure Rule 52(a)(1) as

23 **JURISDICTION**

24 7. Jurisdiction exists under 28 U.S.C. §1334.
25 Venue is proper under 28 U.S.C. §1409. The District Court for
26

27 ¹ Unless otherwise stated, all Code, chapter, and section references are
28 to the Bankruptcy Code, 11 U.S.C. §§101-1330.

1 the Eastern District of California has generally referred these
2 matters to the Bankruptcy Court for hearing pursuant to 28
3 U.S.C. §157(a) and United States District Court, Eastern
4 District of California General Orders 182 and 223. This is a
5 core proceeding within the meaning of 28 U.S.C. §157(b)(2)(I).
6 This is a complaint objecting to the dischargeability of debt
7 under 11 U.S.C. §§523(a)(2)(A), (a)(4), & (a)(6). Plaintiffs
8 are creditors of the estate and have standing to bring this
9 Adversary Proceeding.

10 FINDINGS OF FACT

11 8. Defendant testified that he is currently employed
12 by Heald College on a part-time basis. According to his
13 testimony, he served in the U.S. Marines for a number of years
14 and another branch of the armed forces. His total service time
15 was 14 years. During his time in the military, he was engaged
16 in construction projects. Following his tenure in the military,
17 Defendant testified that he followed his passion for building
18 and became a general building contractor. According to
19 Defendant's Contractors State License Board ("CSLB") Certificate
20 of Records (Plaintiffs' Exhibit "4"), Defendant's "B" General
21 Building Contractor's License was issued on September 10, 2004.
22 Defendant testified that he built a number of projects,
23 including a small tract of smaller homes, and that he
24 successfully completed some other larger custom homes in what
25 was identified as the "Applegate Project." (Plaintiff's Ex.
26 "17", Deitz E-Mail September 9, 2007.) The Applegate Project is
27 relevant in that it is where Plaintiffs and Defendant first met.

28 9. Wayne Ford was born April 8, 1948 and is 63 years

1 old. He is a disabled veteran. He testified that he served in
2 the U.S. Army as a combat infantry soldier beginning in 1967.
3 He served in Viet Nam. In June 1968, Mr. Ford was seriously
4 injured when a vehicle in which he was a passenger ran over a
5 land mine which detonated. He suffered significant, permanent,
6 and obvious disabilities resulting from the land mine blast and
7 must walk with the assistance of fore-arm Canadian Crutches on
8 both arms. He will likely be confined to a wheelchair in the
9 future. Mr. Ford has no college education and has not worked
10 since being injured. He is permanently disabled.

11 10. Mrs. Ford is a registered nurse. She met her
12 husband in a military hospital in Long Beach upon his return
13 from Viet Nam. They eventually married and she has cared for
14 him over the years.

15 11. In 2006, Plaintiffs had house plans drawn and
16 submitted to the County of Fresno for approval. The plans were
17 for a 4,170 square foot handicap accessible home to accommodate
18 Mr. Ford's significant disabilities. It was designed to comply
19 with the Americans With Disabilities Act ("ADA"), the Veterans
20 Administration ("VA") requirements for handicap assisted
21 housing, and of course, the County of Fresno building code
22 requirements.

23 12. In late August or September 2006, Plaintiffs were
24 driving around and by chance came upon the Applegate Project.
25 Defendant was building three (3) custom homes at the Applegate
26 Project. Mr. Ford testified that he asked permission to look
27 around the three (3) custom homes that were in various states of
28 construction as they were similar in size to what he and his

1 wife were planning to build. Defendant allowed Plaintiffs to
2 look at these homes. Mr. Ford testified that each home had been
3 rough framed, was weather tight, and still in need of drywall
4 and finish carpentry. Two (2) of the Applegate Project houses
5 had covered access porches, which is something Mr. Ford was
6 required to have in order to comply with ADA requirements and to
7 receive VA remuneration for handicap assisted housing.

8 13. After Plaintiffs viewed the Applegate Project,
9 they spoke with Defendant regarding their plans to build a
10 handicap assisted home. The undisputed testimony is that
11 Defendant represented that he was familiar with ADA and VA
12 requirements for handicap assisted housing and that he had, in
13 fact, built to these guidelines before. Defendant represented
14 that he could build to these standards for Plaintiffs.

15 14. The testimony by both Plaintiffs and Defendant
16 was that Defendant met Plaintiffs at their property where the
17 home was to be constructed on at least two (2) occasions. The
18 unrefuted testimony adduced at trial was that during these
19 meetings with Defendant, that Defendant also brought commonality
20 between the parties relying on he and Mr. Ford's military
21 experiences, the fact that Defendant worked as a pharmacy tech
22 at the VA Hospital where Mr. Ford receives treatment, and that
23 Defendant's mother was or is a nurse similar to Mrs. Ford. The
24 Plaintiffs each testified that they asked Defendant if he was a
25 licensed contractor in good standing and he replied that he was.
26 Plaintiffs did testify that they were aware of a bonding issue
27 that needed to be taken care of and that Defendant ultimately
28 represented to them that he obtained a bond so that issue was

1 resolved. However, as the Court noted during trial, and as
2 Defendant admitted on direct examination, his license remained
3 suspended for other reasons at the time he contracted with
4 Plaintiffs. The Court finds that Defendant's representations
5 about the status of his contractor's license was a knowingly
6 made material misrepresentation of fact and that Defendant's
7 conduct was designed with the specific intent to deceive
8 Plaintiffs, to fraudulently induce them to contract with him so
9 he could obtain the job and substantial payments of money from
10 Plaintiffs.

11 15. At some point, presumably prior to September 25,
12 2006, Defendant was provided a set of plans that both he and Mr.
13 Ford initialed while the Plaintiffs' plans were in plan check
14 with the County of Fresno so Defendant could prepare a bid.
15 (Plaintiff's Exhibit "2".)

16 16. On September 25, 2006 Defendant provided a Custom
17 Home Bid/Proposal to Plaintiffs. (Plaintiffs' Exhibit "1") The
18 home's square footage was 4,170 square feet. The total price
19 under the bid for the project was \$444,105.00 or \$106.50 per
20 square foot ($4,170 \times \$106.50 = \$444,105.00$). According to
21 Defendant's bid, the project also included garage square footage
22 of 965 square feet, breeze-way square footage of 309 square
23 feet, porch and patio square footage of 1,136 square feet, and
24 the courtyard square footage of 470 for a total square footage
25 of 7,050 square feet for the project. The bid indicated that it
26 included the cost to build and furnish the materials for the
27 home according to the plans as approved by the County of Fresno.
28 There was a caveat that extra flat-work, such as the driveway

1 and retaining wall, would be an additional charge, not included
2 in the \$444,105.00 contract price. In concluding the bid to
3 Plaintiffs, Defendant signed the letter "Thanks" and "Semper
4 fi". At trial, and on direct examination of Defendant,
5 Defendant was provided a copy of the United States Marine Corps
6 website home page. That home page was entered into evidence as
7 Plaintiff's Exhibit "22". Plaintiffs' counsel had Defendant
8 read the following into the record from the United States Marine
9 Corps home page:

10 "Semper Fidelis
11 More Than a Motto, a Way of Life.

12 *Semper Fidelis* distinguishes the Marine Corps bond
13 from any other. It goes beyond teamwork-it is a
14 brotherhood and lasts for life.

15 Latin for 'always faithful,' *Semper Fidelis* became the
16 Marine Corps motto in 1883. It guides Marines to
17 remain faithful to the mission at hand, to each other,
18 to the Corps and to country, no matter what.

19 Becoming a Marine is a transformation that cannot be
20 undone, and *Semper Fi* reminds us of that. Once made,
21 a Marine will forever live by the ethics and values of
22 the Corps.

23 There is no such thing as an ex-Marine."

24 The Court finds that the use of "Semper Fi" in the September 25,
25 2006 bid was in furtherance of Defendant's intent to induce
26 Plaintiffs to contract with him for the construction of their
27 home.

28 17. Following the initial bid of September 25, 2006,
a Proposal and Contract ("Contract") was drawn by Defendant
dated October 10, 2006. (Plaintiffs' Exhibit "2" and
Defendant's Exhibit "A".) The Contract contained the same total
price of \$444,105.00 for the project. The Contract bore

1 Defendant's California State Contractor's License Number
2 0846254. Regarding Defendant's bonding issue mentioned above,
3 the evidence demonstrated that Mr. Ford executed the Contract on
4 November 7, 2006, one day after Defendant's license suspension
5 for the contractor's bond issue was lifted. (Plaintiffs Exhibit
6 "4", a Certified Copy of Defendant's CSLB License History.)
7 However, Plaintiffs' Exhibit "4" demonstrates that Defendant's
8 license was not reinstated until January 3, 2007 due to an
9 outstanding judgment, for which a suspension was issued on
10 October 12, 2006. Defendant did offer evidence that he had paid
11 this judgment. Nonetheless, Defendant's license remained
12 suspended at the time of contracting. Mr. Ford testified that
13 his only prior experience with a contractor was when he resided
14 in Prescott, Arizona and that he had no problems with that
15 remodel project. The Court finds Mr. Ford's testimony credible
16 and that he justifiably relied upon Defendant's representations
17 that his license issue was resolved prior to executing the
18 Contract.

19 18. The Court finds that Defendant executed the
20 Contract on October 14, 2006, while his license was suspended in
21 contravention of California Business and Professions Code
22 §7028.5, which in pertinent part provides that, "It is unlawful
23 for any person . . . to individually engage in the business or
24 individually act in the capacity of a contractor without having
25 a license in good standing." The Court also finds that
26 Defendant failed to comply with the mandate of California
27 Business and Professions Code §7030.1(a)&(b) requiring
28 disclosure of Defendant's prior license suspensions as

1 Defendant's license was suspended three (3) times prior to
2 submitting the Contract to Plaintiffs. California Business and
3 Professions Code §7030.1(a)&(b) provides:

4 "(a) A contractor, who has his or her license suspended or
5 revoked two or more times within an eight-year period,
6 shall disclose either in capital letters in 10-point roman
7 boldface type or in contrasting red print in at least 8-
8 point roman boldface type, in a document provided prior to
9 entering into a contract to perform work on residential
10 property with four or fewer units, any disciplinary license
11 suspension, or license revocation during the last eight
12 years resulting from any violation of this chapter by the
13 contractor, whether or not the suspension or revocation was
14 stayed.

15 (b) The disclosure notice required by this section may be
16 provided in a bid, estimate, or other document prior to
17 entering into a contract."

18 The Court finds that Defendant offered no evidence that he
19 complied with the mandate of California Business and Professions
20 Code §7030.1(a)&(b). Plaintiffs offered no evidence of any such
21 document presumably because they had none. Defendant's only
22 disclosure relative to his license status was that it was in
23 good standing with the exception of a bonding issue that he
24 represented to Plaintiffs he had cured. The Court finds that
25 this representation was material, false, intentional, and
26 designed to induce Plaintiffs to contract with Defendant.

27 19. Included in the Contract was an attorney fees
28 clause which provided:

"In the event it becomes necessary to refer said
proposal/contract to an attorney, the undersigned agrees to
pay attorneys' fees and all costs incurred in the
collection of the monies due under the proposal/contract."

While Defendant's Exhibit "A" (the "Contract") does not contain
a "Notice to Owner", a "Notice to Owner" page was attached to
Plaintiffs' Exhibit "2" (the "Contract"). The "Notice to Owner"

1 in part provides:

2 "Under the California Mechanics' Lien Law, any
3 contractor, subcontractor, laborer, supplier, or other
4 person or entity who helps to improve your property,
5 but is not paid for his or her work or supplies, has a
6 right to place a lien on your home, land, or property
7 where the work was performed and to sue you in court
8 to obtain payment.

9 This means that after a court hearing, your home, land
10 and property could be sold by a court officer and the
11 proceeds of the sale used to satisfy what you owe.
12 This can happen **even if you have paid your contractor**
13 **in full if the contractors, subcontractors, laborers,**
14 **or suppliers remain unpaid."**

15 20. The Contract references the home was 4,170 square
16 feet at \$106.50 per square foot, consistent with the September
17 25, 2006 bid. It further provides line item budgeted amounts
18 for things such as termite pre-treat, foundation, framing,
19 lumber, roofing, plumbing, plumbing fixtures, HVAC, electrical,
20 electrical fixtures, drywall, finish carpentry, labor, cabinets,
21 flooring, tile/counter tops, paint, stucco, garage doors,
22 doors/moulding/trim, appliances, mirrors/shower doors, cleanup
23 and trash. The Contract refers to an Addendum which is set out
24 as Defendant's Exhibit "A-4" that generally is an acknowledgment
25 by Defendant and Plaintiffs of the ADA and VA requirements for a
26 handicap assisted house. It also includes a schedule of
27 payments attached as Defendant's Exhibit "A-3" calling for
28 payments beginning October 15, 2006 and continuing thereafter.

21. The most comprehensive itemization of payments
made, with corresponding receipt numbers, are set forth in
Plaintiffs' Exhibit "8" showing payments made by Plaintiffs to
Defendant corresponding with the line item allocations in the
Contract. Plaintiffs also provided Exhibit "9" which included

1 front and back copies of each negotiated check and corresponding
2 receipts. The total remuneration paid to Defendant was
3 \$511,795.00. This includes a \$6,500.00 credit given by
4 Defendant to Plaintiffs as set forth in Receipt No. 722754
5 (Defendant's Ex. E-10; Plaintiffs' Ex. 9) for Plaintiffs'
6 payment of \$6,500.00 paid directly to Pacific Door by Mr. Ford,
7 and a \$4,100.00 payment paid by the VA for certain concrete work
8 required by the VA. Defendant's Exhibit "D-4", which is a letter
9 from Mr. Kennedy with the VA, indicates that the total amount
10 paid to the builder was \$511,795.00.

11 22. Although the contract price was for \$444,105.00,
12 on or about June 27, 2007, a handwritten document entitled "Ford
13 Budget" was submitted to Plaintiffs in the amount of \$67,200.00.
14 (Plaintiffs' Exhibit "3"; Defendant's Exhibit "A-5") The "Ford
15 Budget" included amounts for roofing, fireplace, something that
16 appears to be finish electric, cabinets, flooring, counter tops,
17 tile, doors/trim, home theater, appliances, gutters, w/IT
18 permit, an unreadable line item 13, utilities, stucco color and
19 windows. There is also a notation for showers for \$6,500.00. A
20 number of these items were included in the original Contract
21 line item schedule. The evidence is that Plaintiffs paid
22 \$63,595.00 of the \$67,200.00. (Defendant's Exhibit "A-10a".)
23 When the Court adds the \$63,595.00 (which includes the \$6,500.00
24 paid directly to Pacific Door and credited under Receipt No.
25 722754 in the above-referenced paragraph) plus the \$4,100.00
26 Veterans Administration check (Plaintiffs' Exhibit "8";
27 Defendant's Exhibit "E-T"), and the original contract amount of
28 \$444,105.00, the sum is \$511,800.00. The Court finds that the

1 total amount paid to Defendant according to Plaintiffs' Exhibit
2 "8" was \$511,800.00 toward the completion of the project.

3 23. Despite Plaintiffs' payment of the \$511,800.00 to
4 Defendant to build the custom home, to date, Defendant admitted
5 that he failed to complete construction of the project and did
6 not obtain a certificate of occupancy from the County of Fresno.
7 The evidence before the Court was that Plaintiffs had on
8 numerous occasions requested an accounting and specific
9 itemization with receipts and invoices for the monies paid to
10 Defendant for the construction of the home. Mr. Ford's
11 testimony is that the accounting was not provided. Defendant,
12 on the other hand, indicated that his accounting was provided in
13 what are referred to as Defendant's Exhibits "A-7", "A-8" and
14 "A-9". Exhibit "A-7" indicates that there was a total amount
15 due as of September 8, 2007 of \$49,798.00. The Court took
16 judicial notice of the Debtor's bankruptcy schedules that no
17 account receivable in that amount was scheduled. The Court
18 finds that Defendant never provided Plaintiffs an appropriate
19 accounting. Rather, Defendant simply submitted asserted
20 overages without proof, and unsigned change orders.

21 24. Regarding Defendant's Exhibit "A-8", this
22 document is entitled a "Change Order for Custom Home page two".
23 There is an over-budget amount listed at \$117,925.00. It is
24 executed by Defendant, but not executed by Mr. Ford. Mr. Ford's
25 testimony, which the Court finds is credible, was that he never
26 executed any change order document. Defendant did not produce
27 into evidence any executed change order document. The same
28 holds true with Defendant's Exhibit "A-9" dated September 13,

1 2007 showing upgrades/additions on contract of \$118,975.00. It
2 states that the total of upgrades/changes was \$73,187.00 or 16%.
3 Again, this document is executed by the Defendant and not Mr.
4 Ford.

5 25. Defendant was the first witness called by
6 Plaintiffs. Defendant admitted knowing that it was unlawful to
7 contract for work when his license was suspended. He admitted
8 to contracting without a license. He also admitted that the
9 Plaintiffs paid as required under the Contract and that the
10 Contract contained an attorney fees clause.

11 26. Plaintiffs entered into evidence Exhibit "5", a
12 Certified Copy of a Second Amended Felony Complaint captioned:
13 The People of the State of California vs. Shawn Deitz. The
14 Second Amended Felony Complaint was filed March 23, 2009 bearing
15 Fresno County Superior Court Case No. F07908612 and DA File No.
16 2006Z44747. There were five (5) counts set forth in the Second
17 Amended Felony Complaint. Mr. Ford testified the Second Amended
18 Felony Complaint was filed after he and his wife initiated a
19 complaint with the District Attorney's office. Under Count Five
20 (5) of the Second Amended Felony Complaint, Defendant was
21 charged under Penal Code Section 487(a), that being the crime of
22 grand theft of personal property for unlawfully taking money and
23 personal property of a value exceeding \$400.00 of Wayne Ford.

24 27. This Court's Minutes of November 5, 2009 in this
25 Adversary Proceeding indicate that the Adversary Proceeding was
26 continued from time to time to allow the criminal matter to be
27 tried. It was ultimately tried in October 2010 before a jury.
28 The victims in the complaint under Counts One (1), Three (3),

1 Four (4) and Five (5) were persons named Andrea C. Burnett,
2 Herbert Milton Chartley, Michael Angelo Dejusto, and Wayne Ford
3 respectively. Ms. Burnett, Mr. Chartley and Mr. DeJusto were
4 each scheduled in Defendant's bankruptcy schedules as general
5 unsecured creditors and their claims discharged. Ms. Burnett
6 and Mr. Chartley will be discussed further below. Count Two (2)
7 was a misdemeanor count brought under California Business and
8 Professions Code §7028 for contracting without a license on or
9 about July 1, 2004.

10 28. Following the criminal trial held in October
11 2010, the jury acquitted the Defendant on Counts One (1), Three
12 (3), Four (4) and Five (5). According to Defendant's testimony,
13 the jury was polled and voted to acquit 11 to 1 on those counts.
14 The Court notes that the standard of proof in the criminal
15 proceeding is "beyond a reasonable doubt". Acquittal on those
16 counts is not relevant to this Adversary Proceeding to determine
17 dischargeability of a debt.

18 29. As to the second count of contracting without a
19 license, Defendant was convicted of contracting without a
20 license in July 1, 2004 in violation of California Business and
21 Professions Code §7028. (Plaintiffs' Exhibit "6"). The Court
22 finds this is relevant in light of Federal Rules of Evidence
23 Rule 406 regarding the habit of a person. In this case, the
24 Court finds that the Defendant knowingly, and repeatedly, in
25 contravention of California law, contracted to construct
26 multiple projects while not possessing a contractor's license in
27 good standing.

28 30. The second witness called by Plaintiffs in the

1 case was John P. Thompson of Thompson Construction. His Resume
2 was entered into evidence as Plaintiffs' Exhibit "10". He served
3 in the United States Navy and is a Viet Nam Veteran. Mr.
4 Thompson obtained his General Building Contractor's License in
5 1979. He has worked in the construction industry for over 35
6 years. His Resume indicates that he attained an Associate of
7 Arts Degree in Business Administration and transferred to San
8 Jose State University where he obtained a Bachelors of Science
9 Degree in Criminal Justice with a Minor in English. In 1985 he
10 was hired by the CSLB in Northern California to participate in a
11 then new program called the Expert Witness Contractor Program.
12 He served for five (5) years as an expert witness for the CSLB.
13 Thereafter, he served for approximately 18 years as a senior
14 investigator for the CSLB. He also served as a Deputy Labor
15 Commissioner with the State of California Labor Commission
16 Office serving in the Fresno Office. He retired from state
17 service in October 2010, renewing his contractor's license, and
18 currently works as an industry expert witness for the CSLB and
19 does contracting work on the side.

20 31. Mr. Thompson's Report of Inspection and Estimate
21 ("Report") was received into evidence as Plaintiffs' Exhibit
22 "11". Regarding his Report, Mr. Thompson testified that he
23 reviewed the Contract, and compiled the information contained in
24 the Report by personally inspecting the custom home project on
25 December 30, 2010. Mr. Thompson found generally that the
26 construction performed by Defendant did not meet accepted trade
27 standards for good and workman-like construction in numerous
28 regards. He took numerous pictures and provided an estimate for

1 the cost to complete/correct the work listed in the Report at
2 \$238,950.00. The cost includes labor, materials and services.
3 Page two of the Report indicates that Mr. Thompson had
4 personally performed and/or supervised over 100 projects similar
5 to the Ford project. The Report lists the four (4) contracting
6 licenses that he possesses, those being a General Building and
7 Remodeling Contractor License, a C-15 Flooring Contracting
8 License, a C-33 Painting Contracting License and a C-54 Ceramic
9 Tile Contracting License. On page three of Mr. Thompson's
10 Report, there is a statement that he prepared the Report based
11 on his knowledge, skill, experience and training in the fields
12 of general building and remodeling, flooring, painting and
13 ceramic tile. He further discloses that he would not enter into
14 any contract to perform the completion/correction of any work
15 which was the subject of his Report. He certifies under penalty
16 of perjury that he does not personally know Plaintiffs and that
17 all statements, answers and representations in the Report,
18 including the attachments, are true and accurate. Mr. Thompson
19 testified that he has appeared and testified in numerous
20 proceedings as an industry expert and on behalf of the CSLB.
21 The Court finds his testimony credible.

22 32. Mr. Thompson lists 15 line item complaints in his
23 Report. The first is that the appliances were not supplied and
24 installed. The Report, Mr. Ford's testimony that the appliances
25 had been paid for but not installed with the exception of one
26 (1) double-oven, and Defendant's pictures received into evidence
27 support a finding that the majority of the appliances were not
28 installed. Mr. Thompson's cost to correct or complete this item

1 is \$9,245.00. The testimony at trial was that the Plaintiffs
2 had paid for the appliances in the amount of \$3,000.00 under the
3 initial bid (Plaintiffs' Exhibit "2") and an additional
4 \$11,600.00 in June 2007 (Plaintiffs' Exhibit "3"). Thus, the
5 total amount paid for appliances that were not supplied was
6 \$14,600.00. The one caveat is that one appliance, a double
7 oven, was the only appliance installed.

8 33. The second item in Mr. Thompson's Report was that
9 the finish carpentry had not been completed. He indicates that
10 the majority of the base boards had been installed but that the
11 gaps had not been filled and no painting had been done. His
12 observations in the Report were that most of the interior door
13 openings had been finished with jambs and casings, however, the
14 nails were not set and filled, nor were the gaps filled or the
15 trims painted. He testified that a number of doorways were also
16 out of square meaning significant work will be required to
17 correct these deficiencies so doors will properly fit, open, and
18 close. He also noted in his Report that with the exception of
19 three doors that had been hung, there were a number of doors
20 stacked in the garage that were painted but severely damaged
21 needing to be replaced. He states in his Report that the finish
22 carpentry was not completed to accepted trade standards and that
23 the cause of the defect was abandonment by the Defendant. The
24 cost to correct this item is \$12,900.00.

25 34. Regarding electrical work, a number of issues are
26 listed in the Report. The Report indicates that the electrical
27 work was not completed to accepted trade standards, that certain
28 fixtures are not installed as called for under the plans, and

1 that the cause of the defect was abandonment and deviation from
2 the approved plans. The recommended method of correction is to
3 troubleshoot the entire electrical system by tracing each
4 individual circuit from the power supply source and "Ringing out
5 the system." His estimate to correct and complete the
6 electrical items is \$10,000.00.

7 35. Item 4 in the Report regards two fireplaces.
8 Although two gas fireplaces were installed, as indicated in
9 photographs 14 and 20 of his Report, the grates, burners and
10 valves remain in the cartons in which they were shipped and
11 placed inside the fireplaces. The exterior trim around the
12 fireplaces, hearths, and mantles were not installed. He
13 indicates in the Report that Note No. 3 of the approved plans
14 called for tight-fitting closeable glass or metal doors
15 installed. While glass doors were installed, he indicates in
16 his Report that the outside air-intake and dampers were not
17 installed, nor was the flue damper or control installed. He
18 again indicates that the complaint items fail to meet accepted
19 trade standards with the cause of defect being abandonment,
20 deviation from plans and specifications, and departure from
21 acceptable trade standards. The cost to resolve these problems
22 is \$3,100.00.

23 36. Item 5 in his Report regards plumbing. While the
24 top-out rough plumbing was inspected and signed off by the
25 County of Fresno on February 23, 2007, Mr. Thompson indicates
26 that the tankless water heaters were set in place but not
27 completed, having no water supply or return plumbing. Item 5 of
28 Plaintiffs' Exhibit "24", the Department of Veterans Affairs

1 Compliance Inspection Report dated March 5, 2008 prepared by
2 Paul Kennedy, the VA Building Inspector, further corroborates
3 that the water heater lacked venting and required a 3/4" copper
4 pressure relief valve. Mr. Thompson also states that the toilets
5 installed were not the brands selected by Plaintiffs and that
6 less expensive models or brands were utilized. He further
7 indicates that the sinks and fixtures were not installed, and
8 the Court observed in Defendant's pictures, which Defendant
9 moved into evidence, that there were boxes of plumbing supplies
10 sitting in open cabinetry in at least one of the bathrooms of
11 the home. The Report indicates that the fiberglass bathtubs had
12 been set on plywood frames and that despite the Contract with
13 the Plaintiffs for installation of cast iron tubs, the Defendant
14 deviated from the Contract and merely set in place, but did not
15 install, the fiberglass bathtubs. Again, the cause of the
16 defect is Defendant's abandonment. Mr. Thompson testified that
17 the cost to troubleshoot the plumbing system is a time-consuming
18 and costly venture. His estimate to correct and/or complete the
19 plumbing issues is \$30,000.00. The Court also finds that
20 Defendant failed to pay Ferguson Enterprises, Inc. in an amount
21 of \$1,585.14 which is evidenced by the Ferguson Enterprises,
22 Inc.'s Mechanic's Lien filed with the Fresno County Recorder's
23 Office on January 22, 2008 as Document No. 2008-0007896 in the
24 amount of \$1,585.15. (Plaintiffs' Exhibit "N".) The Court
25 finds this Mechanic Lien to be damages attributable to
26 Defendant's conduct and that with interest allowed under
27 California Code of Civil Procedure §685.010(a), that interest
28 accrued at the rate of 10% up to the time of trial in the amount

1 of \$504.24 and thus the total as of April 4, 2011 owing to
2 Ferguson Enterprises, Inc. on this Mechanic's Lien is \$2,087.39.

3 37. Item 6 of the Report involves cabinetry. In the
4 Court's view, cabinetry is a significant item showing
5 Defendant's abandonment of the project. The testimony in the
6 case by Mrs. Ford was that she had met with Defendant initially
7 regarding one type of cabinets. The Defendant instructed her to
8 go to a website that had certain types of cabinetry. Mrs. Ford
9 testified that she did as the Defendant instructed. She went to
10 the appropriate website and decided on a Shaker-style cabinet,
11 downloaded pictures of the same, and met with Defendant at
12 Defendant's house to look at similar type cabinetry doors.
13 Defendant represented that he could and would build the
14 cabinetry. Defendant did not dispute this testimony. The
15 Defendant's own pictures show that in the kitchen and multiple
16 bathrooms, the cabinetry is far from complete. Despite
17 Plaintiffs paying for the cabinetry, all that has been installed
18 are frames with no backing, shelves, holes for shelves to go on,
19 and no cabinet doors or drawers. The cabinetry is far from
20 complete. In Mr. Thompson's Report, the cause of the defect,
21 again, is abandonment and departure from trade standards. The
22 Court finds abandonment is the cause of the cabinetry issues.
23 The method of correction in Mr. Thompson's Report is to remove
24 all temporary framing and build and install new cabinetry at a
25 cost of \$38,950.00. The Court also reviewed Defendant's Exhibit
26 "W" which is a construction bid dated May 14, 2008 from JCL
27 Construction ("JCL") to complete the work at Plaintiff's house.
28 JCL's bid to complete the house was \$122,014.00. However, in

1 the Court's view, the JCL bid is not as comprehensive as the
2 Thompson Report, as it fails to account for such items as the
3 appliances Plaintiffs paid for, does not account for counter-
4 tops in bathrooms and other areas besides the kitchen, only
5 contemplates 3,000 square feet of tile while Defendant testified
6 there is 3,600 square feet of tile, and in general, is less
7 comprehensive as the Report. The JCL bid for cabinetry with
8 maple Shaker style cabinets, which the Court finds was the
9 agreed-upon type of cabinets between the parties, was
10 \$36,000.00. In addition, under the JCL bid the installation
11 cost for the cabinets is an additional \$4,600.00, and the cost
12 to stain and finish the cabinets is \$3,450.00 bringing the total
13 to \$44,050.00. The Court finds Mr. Thompson's cost to complete
14 and install the cabinetry in the amount of \$38,950.00 is
15 credible.

16 38. Another significant item not completed and
17 totally absent in the home are the counter tops. There was
18 testimony by Mrs. Ford, Mr. Ford, Mr. Thompson, and the
19 Defendant specifically regarding the counter tops. The Court
20 finds the undisputed evidence is that the counter tops were to
21 be granite. Defendant's pictures in particular, as well as
22 Plaintiffs' pictures, are very representative of the way the
23 home sits today. The Defendant's pictures show no granite
24 counter tops installed in the home. Defendant testified that no
25 granite was ever delivered to the house. He further testified
26 that he did not know where the granite was. The allowance in
27
28

1 the October 6, 2006 Contract for tile²/counter tops was
2 \$15,000.00. While it is undisputed that Plaintiffs paid that
3 amount, there are no granite counter tops or back splashes in
4 the home. According to Mr. Thompson's Report, and his
5 testimony, the cause of the defect was abandonment by Defendant,
6 the failure to appropriately prepare the substrate support for
7 the counter tops, and the failure to provide and install the
8 granite counter tops after the material was selected at DAL Tile
9 and paid for by Plaintiffs. Mrs. Ford testified that when she
10 spoke with the representative at DAL Tile, he indicated that the
11 Defendant never paid any money toward the granite counter tops
12 and that the granite was put back into inventory for sale to
13 other customers. Mr. Thompson's cost to complete this abandoned
14 item is \$24,550.00. This includes preparation of the substrate
15 structures so they will properly hold the weight of the granite
16 upon its installation. The Court finds this to be a reasonable
17 cost to complete the counter tops.

18 39. The next item concerns the tile floors. Tile
19 floors are very significant due to Mr. Ford's disability. The
20 floors must be smooth so as not to constitute a safety hazard.
21 According to Defendant's testimony, there is approximately 3600
22 square feet of tile flooring that needed to be provided for the
23 home to accommodate Mr. Ford's needs. Mr. Thompson observed in
24 his Report, and testified, that the tile floors were not

25
26 ² Defendant's Exhibit "W", the JCL Construction Bid dated May 14, 2008,
27 includes \$10,800 for standard grade granite and an additional \$1,690.00
28 for kitchen tile back splash. The Court finds the "tile/counter tops"
in Defendant's October 6, 2006 Contract was for tile back splash and
granite counter tops.

1 completed, that different dye lots and colors of tile were
2 installed, and that the tile that was installed was uneven and
3 cracked. His observations were that the tile that was cracked
4 due to the slab foundation being incorrectly poured. In his
5 Report, under item eight, Mr. Thompson notes that Note #12 of
6 the approved plans called for the slab foundation to be three
7 and one-half inches thick with a 6 x 6-pound 10X welded mesh
8 wire installed mid-point in the slab. The Report indicates that
9 the Plaintiffs observed the pouring of the slab foundation and
10 no wire mesh was installed. The Defendant did not rebut this
11 evidence. Mr. Thompson's Report indicates that the failure to
12 follow the approved plans in the pouring of the slab foundation
13 was not within acceptable trade standards, and alone, was
14 sufficient to cause the severe cracking of the slab, which
15 ultimately contributes to the cracking of the tiles. He further
16 observed that there was a significant problem with "lippage".
17 Lippage is the difference in height between the edge of one tile
18 and another adjacent tile. Excessive lippage results in a trip
19 hazard, especially dangerous where someone is handicapped, as is
20 Mr. Ford. Mr. Thompson testified that the industry standard for
21 tile lippage is 1/6". The pictures accompanying his Report show
22 that the lippage between the tiles in some instances is 3/16" to
23 5/16". He testified that this occurs throughout the home where
24 tiles were set. Regarding the slab floor, Mr. Thompson
25 testified, and his Report indicates, it deviates from industry
26 accepted standards of a "plus or minus" of 1/4" over ten feet.
27 Some of his photos, for example, photos 24 and 25 to his Report,
28 show a severely cracked concrete slab floor which is the result

1 of no steel reinforcement in the concrete slab floor and 5/16"
2 displacement between the two cracked edges. Photo number 26
3 shows the concrete slab floor is out of level 3/8" over six
4 feet. Photo number 27 shows tile lippage of 3/16", while photo
5 number 28 shows cracked tile that has "telegraphed" from the
6 cracked concrete slab floor under the tile.

7 40. The cause of the defect with respect to the
8 concrete slab floor was deviation from accepted trade standards.
9 Regarding the tiles, the Court finds that Defendant failed to
10 order all tiles at the same time so they would be matching and
11 from the same dye lot, and this in turn resulted in Defendant
12 being unable to install sufficient tile of a single dye lot to
13 complete the entire project. Mrs. Ford testified that the
14 specific tiles selected had a slip resistance comparable to
15 commercial grades of tile especially selected due to her
16 husband's disability. The tiles have now been discontinued,
17 thus making ordering additional matching tile impossible.
18 Defendant corroborated Mrs. Ford's testimony. The Defendant did
19 offer, however, that he was able to find similar tiles and if
20 they were set in another room, one would not be able to tell the
21 color differentiation. The Court finds Defendant deviated from
22 the plans and specifications by failing to install the wire mesh
23 in the foundation which resulted in excessive cracking of the
24 concrete slab foundation which then telegraphed into the tile
25 floors which caused excessive cracking of the tile floors. The
26 Court further finds that Defendant failed to install the tile
27 flooring level between the tiles in conformity with trade
28 standards causing excessive and unsafe lippage. The Court finds

1 this perhaps is the most costly item to complete. As Mr.
2 Thompson testified, the best corrective action short of razing
3 the entire structure and removing and replacing the entire
4 foundation, would be to remove all of the tiles from the floor,
5 clean the floor of all thin-set adhesive, grind the exposed
6 cracks with a "B" diamond tool and fill the cracks with epoxy.
7 From there the floors must be floated out so they will be level,
8 and Plaintiffs will have to re-purchase and install new equal in
9 value 20" x 20" tiles and grout as required. His estimate of
10 cost to fix this portion of the job is \$60,350.00.

11 41. Item No. 9 regards insufficient insulation in the
12 attic. Mr. Thompson observed that the approved plans called for
13 blowing insulation under the work platform for the heating and
14 air conditioning unit in the attic. His estimate to complete
15 the insulation installation was \$1,600.00. The rain gutters,
16 which were a \$2,600.00 line item paid for in Plaintiffs' Exhibit
17 "3", were never installed. Mr. Thompson's estimate to install
18 galvanized gutters and a new drip edge metal and down spouts is
19 \$5,600.00. On cross-examination he testified that the
20 difference in price from the \$2,600.00 cost Defendant allocated
21 and Mr. Thompson's cost of \$5,600.00 was because the roof tiles
22 would have to be lifted in order to place the drip edge and rain
23 gutters under the roof tiles and adhere them to the fascia
24 board.

25 42. The next complaint was that there was debris left
26 on the roof and that the monetary cost to clean the debris from
27 the roof is \$350.00.

28 43. Mr. Thompson observed in his Report that one air

1 conditioning unit was missing as called for in the approved
2 plans. The original plans called for three. However, the
3 contract signed by the Plaintiffs only indicates two air
4 conditioning units. The Defendant testified the two air
5 conditioning units would supply the same output as the three
6 called for under the approved plans. However, it is unclear as
7 to whether the output of the two installed air conditioning
8 units would equate to the same output as the three called for
9 under the plans. What is clear and the Court so finds, is that
10 Defendant again deviated from the approved plans. The Court
11 does note that on Exhibit "B" to Mr. Thompson's Report
12 (Plaintiffs' Exhibit "11"), that the refrigeration unit/furnace
13 required to be inspected and signed off by the County of Fresno
14 inspector, has not been signed at all.

15 44. Item No. 13 in the Report regards the footing for
16 the columns that support the front portico. The Report
17 indicates they are too small. There was no cost to complete that
18 deviation from the plans. Item No. 14 in Mr. Thompson's Report
19 is a belly band on the exterior of the structure. The plans
20 called for the belly band, which is a decorative feature, to be
21 installed around the entire structure. It was only installed in
22 the front of the home. The corrective measure to install the
23 belly band around the remaining three sides of the home would be
24 to install a foam belly band around those three exterior walls,
25 re-stucco them as required, and painting. The cost to do that
26 would be \$3,700.00. The cause is again abandonment by
27 Defendant.

28 45. The last item in the Report regards incomplete

1 painting. Mr. Thompson's Report indicates that the industry
2 standard regarding painting is that painting of a completed home
3 is a final opportunity to enhance the workmanship of the
4 builder. The Report states that the lack of paint, or "botched"
5 painting, tends to enhance the poor workmanship this contractor
6 performed on the job. The cause of this defect as well as that
7 of the belly band, the footing for the columns that support the
8 front portico, and the air conditioning, the roof, rain gutters
9 and insulation in the attic are abandonment of the project.

10 46. The total cost to complete the project, according
11 to Mr. Thompson's Report, is \$238,950.00. The Court finds this
12 cost to be realistic.

13 47. Mr. Thompson also testified regarding his
14 investigation, as the senior investigator for the CSLB, of the
15 Andrea Burnett and Herbert M. Chartley jobs. Defendant was the
16 contractor on these jobs. Plaintiffs' Exhibit "12" has the CSLB
17 Licensee Investigation Reports that were assigned to Mr.
18 Thompson for investigation. Mr. Thompson testified that he
19 prepared these reports in the ordinary course of business while
20 he was an investigator for the CSLB. In each one of these
21 cases, similar problems existed. For example, as Plaintiffs'
22 Exhibit "14" demonstrates, with respect to the Burnett property,
23 the Defendant contracted without a license, took a \$15,000.00
24 check when he was supposed to be paid \$1,500.00, cashed the same
25 claiming that it was a mistake, failed to exercise reasonable
26 diligence to complete the job, exceeded the contract amount for
27 the project as is the case herein, and then abandoned that job
28 as well. With respect to the Chartley project, the Defendant

1 lacked reasonable diligence in building the project, departed
2 from accepted trade standards in the building that was done,
3 took monies in excess of the amount of the contract, required an
4 excessive down payment and ultimately abandoned the project. In
5 the Burnett case, Mr. Thompson determined Ms. Burnett suffered
6 damages in the amount of \$17,168.50. (Plaintiffs' Exhibit "12",
7 CSLB Complaint No. NB2006-560 at paragraph 9 synopsis of section
8 violated.) Mr. Chartley was also a disabled veteran. CSLB
9 Complaint No. NA2005-327 regards the Chartley project, which is
10 Plaintiffs' Exhibit "13". The established injury to Mr. Chartley
11 was \$22,671.84.

12 48. The Court also notes that the CSLB on its own
13 behalf had assigned Mr. Thompson to file a complaint with the
14 District Attorney's office for numerous violations by the
15 Defendant. Plaintiffs' Exhibit "14" shows a complaint by "L.
16 Registrar" with various Business Code violations including
17 abandonment of project, diversion of funds, willful and
18 fraudulent acts, contracting without a license and exceeding the
19 contract amount. The Court finds that Defendant has exhibited
20 this type of conduct for a significant portion of his
21 contracting license history and with respect to Plaintiffs'
22 project, exhibited similar conduct.

23 49. Terry Freeman also testified at the trial. Terry
24 Freeman is the manager of Pacific Door. Pacific Door supplied
25 the doors for Plaintiffs' home. Mr. Freeman has worked at
26 Pacific Door for 23 years and held the position as manager for
27 20 years. As the position of manager, he is familiar with the
28 books and records and intimately familiar with receivables due

1 to Pacific Door. He also is familiar with the pre-liens and
2 mechanics liens filed by Pacific Door.

3 50. Mr. Freeman testified that the contract amount
4 for doors for Plaintiffs' house was \$22,508.26. (Plaintiffs'
5 Exhibit "9"). He testified that the only monies paid to Pacific
6 Door by Defendant was \$2,500.00. He also testified that
7 Defendant did tender two other checks each in the amount of
8 \$5,000.00 to Pacific Door. However, those checks were non-
9 negotiable due to non-sufficient funds. Pacific Door sent these
10 checks to the District Attorney for collection. The Court finds
11 that Defendant failed to pay the contract balance due to Pacific
12 Door. Pacific Door ultimately filed a state court action to
13 perfect its mechanic's lien under California law. After
14 Plaintiffs paid \$6,500.00 to Pacific Door, they were ultimately
15 able to settle the remaining balance after hiring another
16 attorney. The case was then settled between the parties with
17 regard to the mechanic's lien filed by Pacific Door by paying an
18 additional \$8,000.00. As stated above, the Court notes that
19 Ferguson Enterprises, Inc. still retains an unsatisfied properly
20 perfected mechanic's lien due to Defendant's failure to pay for
21 plumbing supplies. (Plaintiffs' Exhibit "9"). The Court
22 further notes that Defendant scheduled Pacific Door as a general
23 unsecured creditor in his Schedule "F" in the amount of
24 \$12,505.00. This corresponds to the Pacific Door Amended Claim
25 of Mechanic's lien in the amount of \$12,505.26 filed against
26 Plaintiffs and included in Plaintiffs' Exhibit "9".

27 51. Mr. Freeman further testified that prior to
28 Plaintiffs' project, he had two other dealings with the

1 Defendant. Those cases regarded two homes in the Applegate
2 Project where Plaintiffs and Defendant first met. Mr. Freeman
3 testified that Mr. Deitz never paid for doors he ordered for
4 those homes and that ultimately Pacific Door was forced to
5 collect from the owners of those homes as was the case herein.

6 52. Mr. Ford testified next in this Adversary
7 Proceeding. He testified about a number of items that have
8 previously been discussed. Significantly, Mr. Ford compiled the
9 information set forth in Plaintiffs' Exhibit "7". Plaintiffs'
10 Exhibit "7" concerns monies paid to Defendant while his
11 contractor's license was suspended. The Court finds this amount
12 is \$324,800.00. Exhibit "7" is also supported by Exhibit "8"
13 which is Plaintiffs' compilation of all funds paid to Defendant.
14 It shows that Defendant was paid \$511,800.00 as set forth which
15 includes \$4,100.00 being paid directly to Defendant by the VA
16 for certain concrete work, and \$6,500.00 paid on July 9, 2007
17 directly to Pacific Door by Plaintiffs which Defendant credited
18 Plaintiffs in Receipt No. 722754 in Plaintiffs' Exhibit "9".
19 Exhibit "9" is another compilation prepared by Mr. Ford, who
20 admittedly could not construct a house. Exhibit "9" consists of
21 items that were paid for but Defendant failed to finish or needs
22 to be replaced or repaired with respect to the project. The
23 total, as computed by Mr. Ford in Exhibit "9", is \$154,307.48.
24 In support of Exhibits "7", "8" and "9", and included in
25 Plaintiffs' Exhibit "9", are fronts and backs of the negotiated
26 checks by Defendant and receipts issued by Defendant. At the
27 time of trial, Plaintiffs' counsel and Mr. Ford randomly
28 selected checks and receipts from Exhibit "9" and matched the

1 same to checks set forth in Exhibits "7" and "8".

2 53. The purpose of Plaintiffs' Exhibits "7", "8" and
3 "9" is to establish Plaintiffs' injury and damages. The Court
4 finds that due to the Defendant's intentional and knowing false
5 material misrepresentations upon which the Plaintiffs
6 justifiably relied, that Plaintiffs were injured. The Court
7 further finds that Defendant's failure to exercise reasonable
8 diligence in constructing the home, to build within accepted
9 trade standards, and abandonment of the project proximately
10 caused Plaintiffs' damages. Plaintiffs offered Exhibits "7",
11 "8" and "9" as evidence of the damages sustained by them at
12 Defendant's hands.

13 54. The Court finds that the evidence set forth in
14 Exhibits "7", "8" and "9" is a true and accurate representation
15 prepared by Mr. Ford of all monies paid to Defendant and that
16 damages sustained by Plaintiffs may be computed from these
17 exhibits, if necessary.

18 55. Of particular note in this case are a number of
19 emails set forth in Plaintiffs' Exhibit "17". The email
20 correspondence serves as a significant illustration of the
21 problems experienced by Plaintiffs, and the communications
22 between Plaintiffs and Defendant. Some of the important emails
23 in Plaintiffs' Exhibit "17" begin with an email dated January 7,
24 2008 from Defendant to Mr. Ford. In that email, Defendant
25 states that if he understood his paralegal correctly, they would
26 get Plaintiffs dismissed from the Pacific Door mechanic's lien
27 action based upon the fact that in the papers filed by Pacific
28 Door it was a contract between Defendant's company and not the

1 Plaintiffs. This is in absolute contradiction to the "Notice to
2 Owner" set forth on page two of Plaintiffs' Exhibit "2" wherein
3 Defendant specifically advised that if he failed to pay any
4 supplier who helped to improve Plaintiffs' property, that the
5 supplier has a right to place a lien on the home and sue the
6 Plaintiffs in court to obtain payment. The Court finds that as
7 late as January 7, 2008, Defendant continued making knowing
8 misrepresentations in contravention with his contract that he
9 executed with Plaintiffs. Defendant further indicates in that
10 email that, "I don't see why you need a different attorney on
11 the same case and I will pay for it." This is significant in
12 that there are additional damages in the form of attorney fees
13 suffered by Plaintiffs due to Defendant's failure to pay
14 suppliers.

15 56. The Court also considered Defendant's December
16 27, 2007 email to Mr. Ford. In that email he states that he
17 paid over \$7,000.00 to Pacific Door when Mr. Freeman testified
18 that Defendant only paid them \$2,500.00 of the contract balance.
19 Defendant further states in that email that his license issue
20 had been cleared and the record reflects in Plaintiffs' Exhibit
21 "4" that Defendant's license was reinstated on December 27,
22 2007. The Court finds that the representation of the payment to
23 Pacific Door was yet another intentional misrepresentation made
24 by Defendant to Plaintiffs. In Defendant's October 12, 2007
25 email to Mr. Ford, he indicates that he would give a credit for
26 the cabinets but wanted closure on the project so he could
27 finish the house and move on. He states that, "The more time we
28 delay it keeps costing me both more time and money!" He further

1 states that he had been honest with Plaintiffs since the
2 beginning and was not sure where he had not been more clear on
3 all of the Plaintiffs' budget and items that were added to
4 improve the home. The Court finds first, that Defendant had not
5 been honest with the Plaintiffs since the beginning of the
6 project. Further, that the Defendant never provided an
7 appropriate accounting of all costs and expenses incurred in the
8 construction of the home. This email tends to further discredit
9 Defendant in the eyes of the Court and lends credence to the
10 Defendant's pattern of conduct to abandon jobs prior to
11 completion. This email is also significant when compared to the
12 September 8, 2007 email from Defendant to Mr. Ford. On the
13 second page of that email, the Defendant states:

14 "I have budgeted the house very well and I'm not going
15 to be left in the dust as with my Applegate projects.
16 I was left with over \$120,000.00 still left unpaid."

17 He also states further down in that email that:

18 "I don't want you thinking I'm taking advantage of you
19 any further. We have had great communication up until
20 the end of July and if I have led [sic.] you to
21 believe in any way that I'm dishonest or have given
22 you false information then we will clear it up. All I
23 have tried to do was build your home and give you what
24 I want."

25 The Court finds that in the fall of 2007, after the home was
26 supposed to have been completed, that Defendant was actively
27 pursuing an exit strategy from the project without having
28 completed the work contracted for. These actions, in the
Court's view, constitute a wilful act that is certainly designed
to cause injury to Plaintiffs. It was wrongful, intentional,
the cause of Plaintiffs' injury and/or damages, and was done

1 without just cause or excuse.

2 57. On August 15, 2007 Defendant emailed Mr. Ford
3 indicating that they would be ready for inspection in about two
4 or three weeks. As set forth in the Thompson Report, the
5 inspection card was never signed off for a Certificate of
6 Occupancy and Defendant admitted on direct testimony that the
7 home never received a final inspection and Certificate of
8 Occupancy. This again is simply another misrepresentation of
9 material fact in this case. In Defendant's August 5, 2007
10 email, Defendant states that he ordered 3,600 square feet of
11 tile. Defendant testified that DAL Tile told him he did not
12 need to order all of the tile at once as it was readily
13 available. This is contrary to his August 5, 2007 email
14 correspondence. Defendant continues in his August 5, 2007 email
15 that he was unsure how DAL Tile only ordered 1,000 square feet
16 as the person at DAL Tile told him the same tile was readily
17 available. He professes to again have done his job. He also
18 acknowledges that the entry tiles needed repair and states that
19 he would fix the entry tiles when he received more tiles.
20 Defendant never fixed the tiles. He also professes in his
21 August 5, 2007 email that his contractor's license was in force.
22 However, on August 5, 2007, Defendant's license remained
23 suspended by reason of a judgment obtained in a court action
24 bearing Case No. 06 CE SC 01566 from June 29, 2007.
25 (Plaintiffs' Exhibit "4"). The license was not reinstated until
26 September 4, 2007. Accordingly, the Court finds that the
27 Defendant's statements in the August 5, 2007 email are not
28 credible and continue the pattern of intentional

1 misrepresentations in this case.

2 58. The June 27, 2007 email from Defendant to Mr.
3 Ford is also revealing. It indicates that he received a
4 telephone call from the appliance supplier and the appliances
5 had arrived. Although the appliances had already been paid for,
6 Defendant states in that email that he will need to get
7 \$15,000.00 for the rest of the appliances when the appliances
8 only cost \$14,600.00 and were paid for with \$3,000.00 under the
9 original budget, and \$11,600.00 on June 27, 2007. (Plaintiffs'
10 Exhibit "3"). Moreover, the testimony by Mr. Ford was that
11 they had received numerous phone calls from the appliance
12 supplier and despite the fact the appliances had been received,
13 the Defendant never picked them up. The Defendant, on the other
14 hand, testified that he did not pick the appliances up because
15 the house was not secure. Mr. Ford testified that as the
16 appliances were not picked up, his understanding was that the
17 appliance dealer was levied upon by the Internal Revenue Service
18 and the appliances were sold pursuant to that levy. The Court
19 finds that the Defendant's failure to pick the appliances up in
20 a timely fashion directly resulted and proximately caused injury
21 to Plaintiffs due to Defendant's inaction. Additionally, the
22 Court finds that this is simply another instance in which the
23 Defendant, by failing to account, as he should have, to
24 Plaintiffs for these appliances, as well as other items in the
25 construction project, exhibits another action by Defendant to
26 obtain money from Plaintiffs for which they had already paid.

27 59. The Defendant's email of October 18, 2007 also
28 indicates Defendant had enough money to pay the remaining

1 balance due to Pacific Door. However, the evidence before the
2 Court is, and the Court finds, that the Defendant only paid
3 \$2,500.00 to Pacific Door and this controverts his assertion of
4 having enough money to pay the remaining balance to Pacific
5 Door. The Court finds it significant in that email of October
6 18, 2007 that Defendant stated:

7 "When I issued a receipt for the doors didn't mean they
8 were paid in full!! Never did I give you the impression
9 that you paid me in full for those vendors. Again, I
didn't misuse your funds for your home in any way, shap
[sic.] or form!"

10 The Court finds this assertion to be false and consistent with
11 Defendant's pattern of conduct in this case as well as the cases
12 of Chartley and Burnett.

13 60. Exhibit "18" are the attorney fees of Scott C.
14 Hawkins incurred by Mr. Ford in defense of the Pacific Door
15 lawsuit. Those attorney fees are in the amount of \$5,670.00.
16 Exhibit "19" are the attorney fees incurred as of trial date by
17 Mr. Armstrong in representing Plaintiffs. Those fees and costs
18 total \$20,997.66. Counsel was permitted to supply additional
19 documentation as to other fees and costs incurred. Those fees
20 and costs include the time spent in trial and preparation of the
21 Proposed Findings of Fact and Conclusions of Law. In total,
22 with the cost of Mr. Thompson's, the total fees and costs as of
23 May 6, 2011 are \$50,501.43.

24 61. Exhibit "20" references additional damages
25 suffered by Plaintiffs. Those damages include estimates for the
26 attorney fees mentioned immediately above. Plaintiffs request a
27 return of the \$50,105.00 profit paid to Defendant. They also
28 request damages of \$1,755.75 per month for 45 months as of the

1 time of trial, or \$79,008.75 for insurance, property taxes and
2 payments on the first and second mortgage on the house that
3 Plaintiffs would have sold back in 2007 had the project been
4 timely completed. The Court finds that the Defendant abandoned
5 or was fired and ordered not to return to the property in
6 December 2007. In addition there was a bid by JCL on May 14,
7 2008, to complete the new house, which indicates that the
8 relationship between Plaintiff and Defendant had terminated. The
9 Court is aware of the Plaintiff's position that they did not
10 have funds to complete the house even up to the time of trial.
11 That is another issue not before the Court. Those facts do not
12 make those alleged damages "traceable to " and "resulting from"
13 the Defendant's fraud. Therefore the Court finds that the
14 claimed damages in this category beginning in August 2007 and
15 ending in April 2011 are NOT damages "resulting from " or
16 traceable to" the fraud the Court has found. The Court will
17 allow the sum of \$19,313.25 covering the months April 2007
18 through June 2008. Additional claimed damages by Plaintiff is
19 for the loss of market value of Plaintiffs' current home. In
20 2007 Mr. Ford testified they had listed their home for sale for
21 \$408,000.00 with the outstanding indebtedness of \$325,000.00.
22 The listing of a home does not establish value. That home has
23 certainly depreciated from 2007 but the testimony before the
24 Court, consisting only of Mr Ford's statement, is not
25 sufficient or convincing by the appropriate burden of proof to
26 allow this court to allow this item.

27 CONCLUSIONS OF LAW

28 62. The burden of proof in nondischargeability cases

1 is by a preponderance of the evidence. Grogan v. Garner, 498
2 U.S. 279, 289, 111 S. Ct. 654, 651, 112 L.Ed. 2d 775 (1991).

3 63. This adversary proceeding alleges claims under 11
4 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6).

5 64. 11 U.S.C. §523(a)(2)(A) provides in pertinent
6 part that:

7 "... a discharge under Section 727, ... does not
8 discharge an individual debtor from any debt - ... (2)
9 for money, property, services, or an extension,
10 renewal, or refinancing of credit to the extent
11 obtained, by - (A) false pretenses, false
representation, or actual fraud, other than a
statement respecting the debtor's or an insider's
financial condition;"

12 65. To prove a debt non-dischargeable pursuant to 11
13 U.S.C. §523(a)(2)(A) a creditor must prove by a preponderance of
14 the evidence the following:

15 A. The debtor made the representation;

16 B. That at the time the representation was made, the
17 debtor knew it was false;

18 C. That the debtor made the misrepresentation with
19 the intent and purpose of deceiving the creditor;

20 D. That the creditor justifiably relied on the
21 representation; and

22 E. The damages sustained as a result of the
23 misrepresentations were proximately caused by the debtor's
24 conduct.

25 See In re Slyman, 234 F.3d 1081, 1085 (9th Cir. 2000);
26 In re Britton, 950 F.2d 602, 604 (9th Cir. 1991); In re Kirsh,
27 973 F.2d 1454 (9th Cir. 1992); In re Sabban, 384 B.R. 1, (9th
28 Cir. B.A.P. 2008); In re Martinez, 49 Bankr. Ct Dc 173 (2008

1 Bankr. LEXIS 470) (C.D. Cal. 2008).

2 **THE DEBTOR KNOWINGLY MADE FALSE REPRESENTATIONS**

3 66. California Business and Professions Code Sections
4 7000, et seq., otherwise known as the Contractor's State License
5 Law, requires contractors to be licensed at all times when they
6 contract to perform construction work and while they are
7 constructing works of improvement. California Business and
8 Professions Code Section 7028.5.

9 67. California's strict statutory guidelines are
10 designed in significant part to protect consumers from the
11 perils incident to contracting with incompetent and unlicensed
12 contractors. In re Martinez, 49 Bankr. Ct. Dec. 173 (2008
13 Bankr. LEXIS 470) (CD Cal.2008) approvingly citing Davis Co. v.
14 Superior Court of San Diego County, 1 Cal. App. 3d 156, 158, 81
15 Cal. Rptr. 453 (1969). It is a misdemeanor for any person to
16 engage in the business or act in the capacity of a contractor
17 without having a license, with certain exceptions that are not
18 applicable herein. California Business and Professions Code
19 Section 7028.

20 68. Court California Business and Professions Code
21 Section 7031 prohibits unlicensed contractors from maintaining
22 actions to recover compensation. Additionally, parties
23 utilizing the services of unlicensed contractors may recover all
24 compensation paid to the contractor even where the person for
25 whom the work was performed knew that the contractor was
26 unlicensed. Please see Hydrotech Sys. Ltd. v. Oasis Water Park,
27 52 Cal.3d 988, 1007, 277 Cal. Rptr. 517, 803 P.2d 370, 376
28 (1991).

1 69. Defendant was licensed as a general contractor
2 September 10, 2004, but had at least nine (9) suspensions of his
3 license due to various reasons. He failed to disclose these
4 suspensions to Plaintiffs as statutorily required. California
5 Business and Professions Code Section 7030.1(a)&(b). He was
6 convicted of contracting without a license previously, and
7 admitted at trial that although he represented to Plaintiffs
8 that his license issues were resolved and therefore in good
9 standing as a contractor, he knew when he contracted with
10 Plaintiffs that his license was not in effect. Additionally,
11 Defendant represented that he could and would complete the
12 construction of the home to ADA, VA, County of Fresno building
13 code requirements which he did not do.

14 70. This case bears great similarity to what the
15 creditors in In re Martinez, supra, experienced. In this case,
16 as in Martinez, the Defendant knowingly represented that he was
17 a licensed contractor when he was not, received funds directly
18 from Plaintiffs, and then failed to apply all of the funds so
19 received for construction of Plaintiffs' home. The evidence
20 clearly and amply demonstrates Defendant failed to apply all of
21 Plaintiffs' funds to the project.

22 71. The Court concludes that Defendant knowingly made
23 a false representation that he was a licensed contractor in
24 October 2006 when he contracted with Plaintiffs. The evidence
25 clearly demonstrates that while Defendant had procured a bond
26 and represented to Plaintiffs that his contractor's license was
27 then in good standing, his contractor's license was not
28 reinstated until January 3, 2007 due to being suspended for an

1 adverse judgment. Thus, his license was not in effect until
2 approximately two months after contracting with Plaintiffs.
3 Defendant admitted at trial he knew the representations were
4 false when they were made to the Plaintiffs. Defendant was also
5 convicted of the crime of contracting without a license
6 previously, and admitted at trial that he knew he contracted
7 with Plaintiffs when his license was not in effect.
8 Additionally, the Defendant previously represented that he would
9 complete the construction of the home to ADA, Val and the County
10 of Fresno building code standards.

11 72. Accordingly, the Court concludes that Defendant
12 knowingly made material false representations to Plaintiffs
13 about
14 the status of his contractor's license and his ability to
15 construct the home which Plaintiffs hired him to build.

16 **DEFENDANT'S MISREPRESENTATIONS WERE INTENTIONAL AND MADE TO**
17 **DECEIVE PLAINTIFFS**

18 73. Intent to deceive may be inferred from the facts
19 set forth in the case. In re Rubin, 875 F.2d 755 (9th Cir.
20 1989). Defendant's misrepresentations were intentional and
21 designed specifically to deceive and induce Plaintiffs for the
22 sole purpose of being retained to build Plaintiffs' home and
23 profit thereby.

24 74. Plaintiffs testified that they believed
25 Defendant's license issues were resolved upon his obtaining the
26 contractor's bond to which both Plaintiffs and Defendant
27 testified. In fact, Defendant was convicted of a misdemeanor in
28 the Fresno County Superior Court of contracting without a

1 license in July 1, 2004, pursuant to California Business and
2 Professions Code Section 7028. Defendant's Contractor's Licence
3 history (Plaintiffs' Exhibit "4"), shows numerous suspensions
4 resulting from judgments and lack of bonding. Evidence of the
5 habit of a person or of a routine of practice is relevant to
6 prove that the conduct of the person on a particular occasion
7 was in conformity with their habit or routine practice. Federal
8 Rules of Evidence Rule 406. The Court may only conclude from
9 the evidence presented, that as early as July 1, 2004 and
10 continuing up to and through the time when Defendant contracted
11 with Plaintiffs, that he had intentionally acted on numerous
12 occasions to contract to build in the State of California while
13 his license was suspended. The evidence also shows he abandoned
14 or, failed to complete, at least two (2) other construction
15 jobs. Thus, the Court may only infer and conclude, based upon
16 these circumstances, the testimony, and documentary evidence
17 before the Court, that Defendant acted with the intent to
18 deceive Plaintiffs.

19 **PLAINTIFFS JUSTIFIABLY RELIED UPON DEFENDANT'S**
20 **MISREPRESENTATIONS**

21 75. Justifiable reliance is the standard that must be
22 proven in complaints objecting to the dischargeability of
23 particular debts under 11 U.S.C. §523(a)(2)(A). Field v. Mans,
24 516 U.S. 59, 71, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995).
25 "Justification is a matter of the qualities and characteristics
26 of the particular plaintiff, and circumstances of the particular
27 case rather than of the application of the community standard of
28 conduct to all cases." Field v. Mans, supra, 516 U.S. at 71

1 citing Restatement Second of Torts §540 (1976). Defendant
2 knowingly and repeatedly, in contravention of California law,
3 contracted to construct multiple projects while not possessing a
4 contractor's license in good standing. See Paragraph 29 above.
5 "A person is justified in relying on a representation of fact
6 'although he might have ascertained the falsity of the
7 representation had he made an investigation.'" Field v. Mans,
8 supra, 516 U.S. at 70. The Court concludes that the appropriate
9 standard is a "subjective standard", and whether the reliance
10 was justifiable under the circumstances in this case. See also
11 In re Martinez, supra.

12 76. The Ninth Circuit holds that to determine
13 "justifiable reliance", the court must look to all of the
14 circumstances surrounding the particular transaction, and must
15 necessarily consider the subjective effect upon the creditor.
16 In re Kirsh, 973 F.2d 1454, 1460 (9th Cir. 1992); see also In re
17 Martinez, supra.

18 77. In this case, the Defendant exploited the
19 commonality between himself and the Plaintiffs to gain their
20 trust. He utilized his military career and position as a
21 pharmacy tech at the VA Hospital where Mr. Ford receives
22 treatment to promote a common bond with Mr. Ford. He utilized
23 the fact that his mother is a registered nurse to promote
24 commonality with Mrs. Ford. He was forthcoming about the need
25 to first acquire a bond to reinstate his contractor's license,
26 which he then represented he acquired before contracting and
27 that his license was then in good standing when it was not. He
28 also represented that he was knowledgeable regarding VA and ADA

1 building requirements for handicapped persons, and the County of
2 Fresno building code. Additionally, Mr. Ford testified that
3 Defendant had cured his license issues and that Plaintiff's had
4 only one (1) prior experience with a contractor in Prescott,
5 Arizona and that remodel job went well. As Judge Naugle held in
6 In re Martinez, supra, citing the Restatement Second of Torts
7 §540 (1976):

8 "A person is justified in relying on a representation of
9 fact although he might have ascertained the falsity of the
representation had he made an investigation."

10 The Court concludes that Plaintiffs were not obliged to
11 investigate Defendant's contractor's license history prior to
12 executing the Contract.

13 78. When the Court considers these facts and
14 circumstances, the Court may only conclude that Plaintiffs'
15 reliance was justifiable.

16 **PLAINTIFFS' DAMAGES WERE PROXIMATELY CAUSED BY DEFENDANT'S**
17 **INTENTIONAL MISREPRESENTATIONS**

18 79. Proximate causation,

19 "Is sometimes said to depend on whether the conduct
20 has been so significant and important a cause that the
21 defendant should be legally responsible. But both
22 significance and importance turn upon conclusions in
23 terms of legal policy, so that they depend on whether
the policy of the law will extend the responsibility
for the conduct to the consequences which have in fact
occurred."

24 In re Britton, 950 F.2d 602, 604 (9th Cir. 1991); In re Martinez,
25 supra, approvingly citing W. Page Keeton et al., Prosser and
26 Keeton on The Law of Torts, §42 at 273 (5th Ed. 1984).

27 80. The damages incurred by Plaintiffs are equally a
28 foreseeable consequence of being defrauded by Defendant just as

1 much as the damages were in Britton, supra, and Martinez, supra.
2 Defendant's intentional misrepresentations discussed above
3 provide a firm foundation from which the many damages discussed
4 below occurred and ultimately harmed Plaintiffs. Additionally,
5 the California Business and Professions Code referred to above
6 express a policy that consumers and citizens in the State of
7 California be protected from the perils of contracting with
8 incompetent and unlicensed contractors. Davis Co. V. Superior
9 Court of San Diego County, supra, 1 Cal. App. at 158.

10 **11 U.S.C. §523(a)(4)**

11 81. The second cause of action in Plaintiffs'
12 Adversary Complaint is for embezzlement. Under Federal law,
13 embezzlement has been defined as "the fraudulent appropriation
14 of property by a person to whom such property has been entrusted
15 or into whose hands it has lawfully come." In re Littleton, 942
16 F.2d 551, 555 (9th Cir. 1991) citing Moore v. United States, 160
17 U.S.268, 269 (1885).

18 82. To prove embezzlement requires the showing of
19 three elements: (1) property rightfully in the possession of a
20 non-owner; (2) the non-owner's appropriation of the property to
21 a use other than which it was entrusted; and (3) circumstances
22 indicating fraud." In re Littleton, supra.

23 83. The evidence clearly shows that Defendant was
24 given significant monies and was rightfully in the possession of
25 those funds for a particular purpose, the building of
26 Plaintiffs' home. Defendant failed to utilize these funds to
27 build and complete Plaintiffs' home for which these monies were
28 entrusted. As stated above, Defendant's conduct clearly

1 indicates fraud. Plaintiffs have proven embezzlement as
2 contemplated under 11 U.S.C. §523(a)(4).

3 84. The Court makes no finding that Larceny exists in
4 this case.

5 **11 U.S.C. §523(a)(6)**

6 85. Section 523(a)(6) in part provides that a
7 discharge under Section 727 does not discharge an individual
8 debtor from any debt for willful and malicious injuries.

9 86. According to the United States Supreme Court, the
10 willful requirement of Section 523(a)(6) "modifies the word
11 injury, indicating that nondischargeability takes a deliberate
12 or intentional *injury*, not merely a deliberate or intentional
13 act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57,
14 61, 118 S. Ct. 974, 977, 140 L.Ed.2d 90, 95 (1998). See also
15 Ormsby v. First American, 591 F.3d 1199 (9th Cir. 2010)

16 87. Plaintiffs must prove the "willful injury"
17 requirement under 11 U.S.C. Section 523 (a)(6) by demonstrating
18 that the Debtor either had a subjective motive to inflict the
19 injury, or believed the injury was substantially certain to
20 occur as a result of the Debtor's conduct. In re Jercich, 238
21 F.3d 1202, 1208, (9th Cir. 2001). The Court concludes that both
22 situations exist.

23 88. The requirement of "malicious injury" is separate
24 from the requirement of "willful". In re Su, 290 F.3d 1140,
25 1146, (9th Cir. 2002.)

26 89. A malicious injury requires (1) a wrongful act,
27 (2) done intentionally, (3) which necessarily causes injury, and
28 (4) is done without just cause or excuse. In re Bammer, 131

1 F.3d 788, 791 (9th Cir. 1997) (en banc).

2 90. Under California Civil Code Section 1572, a party
3 to a contract with the intent to deceive another party to the
4 contract, or to induce the other party to enter into the
5 contract, acts with malice causing injury. In re Martinez,
6 supra.

7 91. The Court concludes that Defendant fraudulently
8 induced Plaintiffs to enter into the Contract at a time when he
9 knew he was not licensed. Based upon his prior acts, as the
10 Court notes above, the Defendant had to have believed that
11 injury to the Plaintiffs was substantially likely to occur based
12 upon his actions and/or inaction. Defendant further deceived
13 Plaintiffs into making progress payments with continued
14 misrepresentations about the status of the work on Plaintiffs'
15 home and did so for his own gain to obtain funds from
16 Plaintiffs. This evidences a "subjective motive" by Defendant
17 certain to inflict injury. The funds that Plaintiffs provided
18 to Defendant were substantial and the injury that was caused was
19 certainly foreseeable. The Court concludes that the malicious
20 prong as set forth in In re Jercich, supra, is satisfied.
21 Additionally, the Court concludes based upon the later emails
22 between the parties, that Defendant was seeking an exit strategy
23 without intending to complete construction of the home as agreed
24 upon in the Contract between Plaintiffs and Defendant. These
25 acts constitute a willful and malicious injury pursuant to 11
26 U.S.C. Section 523(a)(6).

27 DAMAGES

28 92. The Court concludes that sum of the damages

1 suffered by Plaintiffs in this case were foreseeable and
2 substantial under each theory pleaded, except larceny in
3 Plaintiffs' Adversary Complaint and arose from Defendant's
4 fraud. The United States Supreme Court holds that damages
5 "resulting from" or "traceable to" fraud are barred from
6 discharge. Field v. Mans, 516 U.S. 59, 61, 116 S. Ct. 437, 133
7 L. Ed. 2d 351 (1995); accord Cohen v. De La Cruz, 523 U.S. 213,
8 218, 118 S. Ct. 1212, 140 L.Ed. 2d 341 (1998); In Re Sabban,
9 supra, 384 B.R. at 6-7. First, the Court discusses the actual
10 damages sustained by Plaintiffs. There are several
11 considerations in this regard.

12 93. Plaintiffs' complaint prays for damages in an
13 amount of at least \$154,307.48. (See also Plaintiffs' Exhibit
14 9, Page 1). This amount was computed by Mr. Ford who testified
15 that he has no experience in construction. Plaintiffs also
16 request in the Adversary Complaint that the Court order the
17 return of Defendant's profit in the amount of \$50,105.00 as
18 Defendant failed to complete the construction and ultimately
19 abandoned the project.

20 94. The Court concludes that while Mr. Ford
21 diligently attempted to quantify the damages, the evidence is
22 that Plaintiffs' damages far exceed his estimate. Plaintiffs'
23 estimate fails to account for removal and replacement of the
24 substantial tile flooring. It fails to account for the cost to
25 repair the foundation, electrical and plumbing issues. It also
26 fails to account for a number of other items as set forth in
27 significant detail in Mr. Thompson's Report including the
28 cabinetry.

1 95. Plaintiffs also offer Exhibit "7" which sets
2 forth all monies paid to Defendant while his contractor's
3 license was suspended. This amount is \$324,800.00. Under
4 California law, Plaintiffs may recover the total of these funds.
5 Business and Professions Code Section 7031(b).

6 96. While the Court concurs with Judge Pappas'
7 dissent in In re Sabban, 384 B.R. 1 (9th Cir. B.A.P. 2008) that
8 Defendant should disgorge all payments made to him while he
9 contracted without a valid license as contemplated under
10 California Business and Professions Code §7031(b) as they were
11 made due to Defendant's fraud, the Court feels constrained to
12 follow the majority opinion in that Bankruptcy Appellate Panel
13 decision and cannot utilize this as a measure of damages.

14 97. Damages are also set forth in the JCL
15 Construction bid of May 14, 2008. (Defendant's Exhibit "W").
16 The amount set forth in this bid is \$122,014.50. There are
17 several caveats at the conclusion of the bid. There is the
18 likelihood for at least a 10% overage on the quoted price due to
19 the fact that other items are likely to be discovered as the
20 project is being finished. Additionally, it fails to account
21 for the appliances Plaintiffs' paid for that were not installed.
22 It fails to provide for bathroom counter tops and back splashes.
23 It also only contemplates replacement of 3,000 square feet of
24 tile as opposed to 3,600 which Defendant testified was required.
25 This bid, in the Court's view, however, is not as comprehensive
26 as Mr. Thompson's Report.

27 98. Mr. Thompson's Report is quite comprehensive and
28 prepared by Mr. Thompson who has significant experience as a

1 contractor and as a Senior Investigator for the CSLB. In the
2 performance of his duties as a Senior Investigator with the
3 CSLB, he calculated damages sustained by parties in regards to
4 various construction projects.

5 99. Mr. Thompson's Report calculates damages
6 sustained by Plaintiffs at \$238,500.00, which the Court
7 concludes is credible. The Court believes the deficiencies
8 needing correction and completion will easily cost this much.

9 100. Secondly, there are additional consequential
10 and compensatory damages suffered by Plaintiffs "traceable to"
11 and "resulting from" Defendant's fraud. These damages include
12 the damages resulting from Defendant's failure to pay certain
13 suppliers. The evidence before the Court is that after
14 Plaintiffs paid Defendant for their doors, Defendant did not pay
15 Pacific Door. Plaintiffs' then paid Pacific Door \$6,500.00 on
16 July 9, 2007 (Plaintiffs' Exhibit "8") and according to Mr.
17 Ford's testimony, an additional \$8,000.00 to settle the mechanic
18 lien litigation. There also is the remaining Ferguson
19 Enterprises, Inc. mechanic's lien in the amount of \$1,584.14 as
20 of trial, and now calculated by the Court to be \$2,087.39.

21 101. Additional consequential and compensatory damages
22 "traceable to" and "resulting from" Defendant's fraud include
23 the payment by Plaintiffs of \$5,670.00 in attorney fees
24 incurred by Scott C. Hawkins to defend the Pacific Door mechanic
25 lien litigation. (Plaintiffs' Exhibit "18").

26 102. Exhibit "20" alleges that they are entitled to
27 other consequential and compensatory damages suffered by
28 Plaintiffs "traceable to" and "resulting from" Defendant's

1 fraud. These damages are the \$50,105.00 in profit paid to
2 Defendant for a construction project he abandoned and 45 months
3 of payments of insurance, property taxes and payments on the
4 first and second mortgage on Plaintiffs' current home that they
5 would have sold in 2007 had the project been timely completed in
6 the amount of \$79,008.75 (Plaintiffs' Exhibit "20"). The Court
7 is allowing as damages the \$50,105.00 in profit paid to
8 Defendant. The Court is only allowing 11 months of payments for
9 insurance, property taxes, and mortgage payments for a total of
10 \$19,313.25 for the reasons set forth in paragraph 61 above. Ex
11 "20" is also claiming \$60,000 for loss of value in their home
12 over the years. The Court is not allowing any damages for the
13 claimed loss of value of Plaintiffs current home as explained
14 above in paragraph #61 for the reason that there was no credible
15 and /or sufficient proof offered to support the claim.


16 103. Lastly, there are the attorney fees and costs
17 including experts of \$55,917.12 (see the supplemental
18 declaration filed by Armstrong) "resulting from" and "traceable
19 to" Defendant's fraud. Defendant's contract includes an
20 attorney fee clause and under California Civil Code Section
21 1717, prevailing parties are entitled to recover attorney fees
22 and costs. The Supreme Court holds that prevailing parties may
23 recover such damages. Travelers Casualty and Surety Company of
24 America v. Pacific Gas & Electric Co., 549 U.S. 443, 127 S. Ct.
25 1199, 1203, 167 L.Ed.2d 178 (2007).

26 104. The Court concludes that damages in this case
27 directly "resulting from" and "traceable to" the Defendant's
28 fraud are as follows:

A.	Cost of Repair and Completion:	\$238,500.00
B.	Mechanic Lien Issues:	16,587.39
C.	Mechanic Lien Attorney Fees:	5,670.00
D.	Return of Profit:	50,105.00
E.	Insurance, Property Taxes and House Payments:	19,313.25
F.	Attorney Fees, Costs, Experts	<u>55,917.12</u>
	Total Damages	\$386,092.76

105. The Court concludes that but for Defendant's fraud, embezzlement, larceny, and willful and malicious conduct, that Plaintiffs would not have suffered these damages. Therefore, the Court concludes as a matter of law that the amount of \$386,092.76 is nondischargeable pursuant to 11 U.S.C. §§523(a)(2)(A), (4), and (6).

Dated: July 28, 2011


Richard T. Ford, United
States Bankruptcy Judge